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S. Rep. No. 252, 41st Cong., 2nd Sess. (1870)

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IN THE SENATE OF THE UNITED STATES.

JULY 11, 1870.—Ordered to be printed.

Mr. DAVIS made the following

REPORT.

[To accompany bill S. No. 919.]

This is an old claim for the value of property belonging to George Fisher, used and destroyed by the army of the United States in the Creek Indian war during the years 1813 and 1814. Fisher presented his petition to Congress on the 12th of February, 1832, asking for the passage of a law for the payment of the value of said property from the treasury.

The claim was large and becoming ancient, and the claimant had been tardy in presenting it; the proof in support of it was not definite, and the officers upon whom its settlement devolved were suspicious of it, and averse to paying the amount demanded. They offered a stubborn resistance; but the claimant having died, his three successive administrators and their agents pressed its payment with great energy, received large allowances upon it from the treasury, and are pressing for a heavy balance. Your committee have endeavored to ascertain whether, on principles of equity and justice, anything more be due on this claim, and if so, what amount.

In 1848 Congress passed an act for the adjustment of this claim, which is in these words:

AN ACT for the relief of the legal representatives of George Fisher, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Auditor of the Treasury of the United States be, and he is hereby, authorized and required to examine and adjust the claims of the legal representatives of George Fisher, deceased, on principles of equity and justice, and having due regard to the proofs for the value of property taken or destroyed by the troops of the United States engaged in suppressing Indian hostilities in the year eighteen hundred and thirteen; and that the said legal representatives be paid for the same out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted,* That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and by the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as from the proofs he may think just and equitable, *so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly:* Provided, That nothing herein contained shall authorize any payment for property destroyed by Indians.

Approved April 12, 1848.

Under the authority of this law the Second Auditor proceeded to settle the claim. He had before him their account of property used and destroyed, filed by Fisher, as follows:

100 acres of corn, 30 bushels per acre, 3,000 bushels.....	\$3,000 00
200 head of cattle, average value \$10 each.....	2,000 00
350 head of hogs, average value \$3 each.....	1,050 00

2,000 hides at tan-yard, \$2 each.....	\$4, 000 00
Furs and hats destroyed.....	600 00
Houses burned, valued at.....	600 00
Crockery-ware.....	100 00
4 dozen wine, at \$12 per dozen.....	48 00
4 barrels whisky, 125 gallons, at \$1.....	125 00
Smith's tools, 1 set.....	100 00
Carpenter's tools and wagon materials.....	150 00
	<hr/>
	11,773 00

STATE OF ALABAMA, *Clarke County* :

Personally appeared before me, the undersigned, a justice of the peace in and for the county aforesaid, Robert G. Haden and Wiley Davis, who, being duly sworn, say that the above amount of property lost by George Fisher, of the county and State aforesaid, during the late war by the Creek Indians, is just and true, and that the valuation of the same is equitable; and that the said George Fisher never recovered, to the best of their knowledge and belief, any compensation therefor.

ROBERT G. HADEN.
WILEY DAVIS.

Sworn and subscribed to before me this 27th day of December, 1831.

Attest :

JNO. CAMPBELL,
Justice of the Peace.

This account was erroneously added up, so as to make the sum of \$12,173.

From the date of the jurat attached to this statement of Haden and Davis, it may be presumed to have been prepared, under the direction of Colonel Fisher, as the basis and to accompany his petition to Congress, presented 12th of February following, 1832. Haden was the kinsman and overseer of Fisher, and had charge of his Basset Creek farm and all his business there when the Indians made their irruption upon it, immediately after their capture of Fort Mims and massacre of the garrison; and Davis was then in his employment as a shoemaker. This account of the property of Fisher at his Basset Creek farm, and of its amount and value, was doubtless prepared by, or under the direction of Fisher, when the three were present, or after they had compared their recollection and knowledge respectively of its matters; and, in connection with the sworn statements of Haden and Davis, form in relation to the claim the most reliable evidence in the case.

Three years after the date of the testimonial of the justice of the peace to the statement aforesaid of Haden and Davis, the former gave his ex parte deposition in relation to this claim before Robert G. Haden, jr., justice of the peace, in which he says :

That in the year 1812 and 1813 he resided in the then Mississippi Territory, Washington County, before the commencement of the Indian war; that he resided near the Indian line of said Territory, and was doing business for Colonel George Fisher, of North Carolina, who had moved a number of hands to that part of the country, and who had purchased some open land of the previous settlers, and made every arrangement and preparation for the removal of his whole family, and to remove there until the land should be for sale by the government; but before he could get his family to the Territory, the hostility of the Indians commenced, and he had to leave his family in the State of Georgia until the Indian war was over, and after the massacre of Fort Mims, which happened in 1813, as well as I can recollect, the 29th or 30th of August of that year. Two or three days after that attack of Fort Mims, the Indians attacked Fort Sinkfield, about three or four miles from where I was doing business. I had the care of said Fisher's property. We were compelled to fly to Fort Stephens, between thirty and forty miles. The Indians then in the settlement destroyed everything they could, after which the troops, who were ordered in pursuit of said hostile Indians, were commanded by Colonels Thomas Carson and Russell, and a number of militia, who took and made use of some of the crops and stock which was not taken by the hostile Indians.

There was a number of large, fat hogs, which he intended for his family bacon, was killed and taken and made use of by the troops, as I myself saw them in their possession. There were also some beef cattle killed and made use of by the troops, which was the property of the said Fisher. The schedule hereto annexed is a true and cor-

rect one as near as I could make; and am certain I have omitted considerable in the number of cattle and the hogs, as I am certain there were more than I have charged in the account; but supposing that some might have gone entirely wild, so that we could not get or hear of them. There were about seventy-five fit for bacon.

I further say that a considerable property of different kinds, which I have noted in the account, as stated and sworn to. I had also employed Mr. Wiley Davis, who was present at the same place with me, as shoemaker and worker of leather, whose deposition is annexed and sworn to the same account with me.

Henry L. Riviere, another witness, proves—

That he resided on Bassett Creek, Mississippi Territory, in the year 1813, at or about the time of the Indian hostility, about the time of the massacre at Fort Mims; and that he lived a neighbor to R. G. Haden, who was doing business for Colonel George Fisher on his said Fisher's plantation, with a number of hands and property of different descriptions; and that about three days after the massacre of Fort Mims, Fort Snokfield was attacked by the hostile Indians, which caused the neighbors to fly to Fort Stephens and elsewhere for safety, leaving their property exposed, which was destroyed and taken away by the Indians and some of the troops, who were in the pursuit of the Indians, at which time the principal part or all Colonel Fisher's property was destroyed or taken away—say considerable quantity of cattle, hogs, some store goods, furs, wares, merchandise, &c., with a considerable quantity of hides in the tan, some nearly tanned, tan-yard and appurtenances, with a number of houses of different descriptions, with a number of tools, all of which were destroyed or taken off as aforesaid.

Witness also proves that the United States troops in that country were in the habit of taking from the people cattle, hogs, and corn.

Absalom Presnal proves that his father lived about three miles from Colonel Fisher when this Indian war broke out; that "he had a very large stock of cattle just brought from Georgia—upward of five hundred head; the large quantity caused me to count them myself. He also purchased a large quantity of stock hogs—between three and four hundred head—from a Mr. Craven P. Morfit." "In 1813, as well as I can recollect, Colonel Fisher opened a small grocery store, and left it under the direction of his overseer to sell and dispose. I believe there were seven or eight barrels of spirits, and goods of different descriptions not particularly recollected by myself. I should suppose the goods were worth from \$1,000 to \$1,200. He had also a large crop of corn—I believe upward of one hundred acres—which was very good. He also had considerable of wheat made that year, and well put up in stacks; and had also purchased eighty-six head of fat hogs from a Tennessee drover, for which I understood he paid \$14 per head." "I was in the service myself continuously, scouting through the country and guarding the frontiers, during which time I saw considerable of Colonel Fisher's stock, both hogs and cattle, killed and made use of by the troops." "All the corn, &c., was totally made use of; the spirits, &c., was drank and used by the troops; hats, blankets, and other goods to the amount above stated. I should say the crop of corn was worth \$3,000, besides the wheat and fodder. The wheat of thirty-five acres of ground, which was good, as I helped to take it and know it was good, all of which was fed to the horses belonging to the troops, I think was worth \$300 or \$400. As to the cattle, they were large, fine fat cattle, some steers weighing from six to seven hundred pounds. I should say they were very low, take them on the average, \$10 a head the stock round."

This witness also proves that Colonel Fisher had another field of corn of about one hundred and twenty-five acres situated on the Alabama River, which had in it peas and pumpkins, all a good crop, which were consumed by the horses of the United States in 1814, and which he thinks was worth, as it stood, \$3,500 at least.

When the Second Auditor heard and decided this case first, the foregoing evidence was before him, and also the depositions of Samuel Harrison, James Turner, and Wiley Davis. His report states that he re-

jected these three last depositions for the want of legal authentication, and decided the case upon the other testimony. He made his award upon this statement of the claimant's account against the United States:

Basis of the first award.

100 acres of corn on Bassett's Creek, 30 bushels to the acre, (one-half).....	\$1,500
400 cattle, \$10 each, (one-half).....	2,000
350 stock hogs, \$3 each, (one-half).....	525
75 fat hogs, \$14 each, (one-half).....	525
Hats and goods used by troops, (one-half).....	500
4 dozen wine.....	48
125 gallons of whisky.....	125
Wheat in stacks.....	250
Corn in Alabama.....	3,500
Total.....	8,873

In adding up his figures he made a mistake of \$100 against the claimant; the aggregate should have been \$8,973, instead of \$8,873. The law under which he acted provided—

That if it shall be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property respectively taken or destroyed by the troops and the Indians, it shall be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as from the proofs he may think just and equitable, so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops, and allow the claimants accordingly, provided that nothing herein contained shall authorize any payment for property destroyed by Indians.

The *just and equitable* idea here established does not touch the matter of interest upon the amount of the claim, but relates only to the apportionment by the Auditor of the quantity of claimant's property respectively destroyed by the army and the Indians, provided the proof should not distinctly and specifically inform him as to that matter.

A few days after the capture of Fort Mims by the Indians, R. G. Haden, the overseer of Colonel Fisher, and other persons resident there, and the neighbors, left, and sought refuge from the Indians at Fort Stephens, about thirty miles distant, and other places. The Indians thereupon occupied this farm, but in what numbers, or how long they held it, does not appear; but it could have been but a few days before the advancing army of the United States drove them and occupied the place. The proof shows that the Indians used and destroyed some of the property, but what or how much does not appear; nor is there any evidence in the case upon which to form a reasonable opinion. The condition of the premises, and the property upon them, when the Indians retreated, and they were occupied by the United States troops, is not shown. Upon these points the claimant could surely have produced proof more certain and satisfactory than he did. The Auditor's duty was to ascertain as far as practicable the property used and destroyed by the Indians and the army, respectively; but he was furnished with no evidence upon which to determine that question with any reasonable certainty. He did come to a conclusion, but reached it arbitrarily, and upon conjecture merely. He decided the whole amount of claimant's property used and destroyed by the United States troops to be \$8,873.

The Indians were in possession of the premises but a few days; they might have set fire to the houses that were burned, taken and destroyed liquors and store goods, some of the hides that were being tanned, and have killed for immediate subsistence some hogs and cattle. Their retreat was probably hurried, and they did not cumber it by driving off the stock; and if they had killed portions of it for destruction, the car-

cases would have been seen by the United States troops and Fisher's employes on their return. The probabilities are that the Indians disposed of but a small amount of the claimant's property, and the decision of the Auditor, by which he charged one-half of all kinds to them, was unauthorized; but the claimant should have furnished him with more certain and satisfactory proof to have enabled him to make a fair and just apportionment.

No additional evidence, except the deposition of Thomas Berry, in support of the claim of Fisher, after this case was first decided by the Auditor, seems to have been taken; and that deposition brings in no new matter, and its only effect is to strengthen and confirm the witnesses whose depositions were then on file. The case, as submitted to the Auditor, was the petition of Fisher, accompanied by his account against the United States, supported by the affidavit of Robert G. Haden and Wiley Davis, and the depositions of said Robert G. Haden and Wiley Davis and of Henry L. Riviere, Absalom Presnal, Samuel Harrison, and James Turner. He rejected the depositions of Harrison, Turner, and Davis, and formed his decision upon the residue of the proof.

If he had retained those depositions and considered them with the others, he could have come to no other proper conclusion than that Fisher, and his relation and overseer, and his hired hand, Wiley Davis, knew more than all other persons of the property Fisher had on his farm on Bassett Creek, and what portions of it had been used and destroyed by the Indians and the United States Army. He had before him Fisher's account, sworn to by Haden and Davis 7th December, 1831; and so far as there was conflict between that account and the depositions of those and other witnesses taken in March, 1834, in which their statements are vague and unsatisfactory, the account and affidavit was entitled to the greater credit, and must control the depositions. The aggregate amount of that account, as cast up, is \$12,173, but in this there is an error; the true amount is \$11,773. The only other kinds of property of Fisher, than what is set forth in the account, for which compensation is claimed, was some wheat in the stack and a crop of corn, peas, and pumpkins growing upon from eighty to one hundred and twenty-five acres of land on the Alabama River, which was used in July or August of 1814. There is no controversy that this crop was consumed by the horses belonging to the army of the United States. The highest value put upon it was by the witness Presnal, who swears that the whole crop as it stood was worth at least \$3,500. That sum, added to the aggregate amount of property of Fisher used and destroyed at his Bassett Creek farm, makes a total of \$15,273.

The committee have not been able to find the petition filed by Colonel Fisher; but, as the testimony in the case shows him to have been an honest, honorable, and patriotic man, they presume that the property set forth in his account was what was used and destroyed by the United States troops. Some of the evidence conduces to prove that he owned more of hogs and cattle than are set forth in the account; but the evidence is quite as satisfactory that some of both cattle and hogs remained after both the Indians and the army had left the place. It cannot be reasonably concluded, as items of cattle and hogs are set forth separately in the account, that Colonel Fisher would have charged against the United States a less number than the soldiers had taken.

The proof shows satisfactorily that when the overseer fled there were there seventy-five or eighty-five head of fat hogs—he says seventy-five—which Colonel Fisher had purchased from a Tennessee drover. These hogs are not included in the account, and a plausible conjecture why

they were not is, that they were taken by the Indians; but the fact might be otherwise. In this uncertainty, to accept the number of these fat hogs to be the largest, eighty-five, and to have been worth \$14 per head, the highest value proved, and all to have been used by the army, and to allow to Fisher at that rate for the whole number, and \$3,500 for the crop on the Alabama River, and all the items, and the value of each one for the property taken on the Bassett Creek farm, as set forth in his account, and it makes an aggregate of \$16,463.

There is no allegation, in any of the several petitions presented for pay for this property, that there was any mistake or error in the account of Fisher, as proved by Haden and Davis; and the evidence in the case does not establish any mistake or error in it. Then to allow to the claimant every item of his account, \$14 per head for eighty-five fat hogs, and \$3,500 for the crop consumed by the soldiers on the Alabama River, would fulfill all that is required by the act of 1848 for the settlement of this claim, and be an adjustment of it on the most liberal principles of equity and justice, if not in excess of that measure. The Auditor might have allowed the sum of \$16,463, as the total value for the property of the claimant used by the United States Army, but certainly not a larger sum. He allowed \$8,873, by his report of April 22, 1848, which included no interest, and that sum was shortly thereafter paid to the representatives of the claimant at the Treasury Department.

In December thereafter, at the instance of claimant, the Second Auditor revised his settlement; and, in his report of it, he refers to all the depositions that were in the case when he first heard it, including those of Harrison, Turner, and Davis, which he had then excluded, and the deposition of Thomas Berry, filed since, were all before him; but he does not state whether, in making the second decision, he considered the depositions he had previously rejected; but it is apparent that he made it upon the same principles and reasoning which had controlled him in his first decision, except that he allowed interest upon the amount of property he found to have been used and destroyed by the army from the time of the presentation of the petition of Colonel Fisher to Congress. The claimant's counsel, it appears, contended before him, by argument and presentation of authorities, for interest from the time of the use and destruction of the property. The Auditor expressly overruled the claim of interest from that date, and allowed it, upon reasons which he stated, from the date of the filing of the petition. He found for the use and destruction of the same property, and at the same value as previously reported by him; he corrected the previous error in the addition of items, and reported for claimant \$8,973, with interest from 13th February, 1832, when the petition was filed. This report was also not satisfactory to claimant, nor could it reasonably have been expected to be, as it made the same arbitrary apportionment of property used and destroyed respectively by the Indians and the army, and was different from the first decision only in correcting the error in addition and allowing interest from filing the petition.

The claimant received, December 31, 1848, the sum of \$8,797 94, the additional amount allowed by this settlement, and six years afterward procured the passage of this act of Congress:

AN ACT supplemental to an act therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it shall be the duty of the Second Auditor of the Treasury, under the provisions of the act of Congress for the relief of the legal representatives of George Fisher, deceased, approved 12th of April, 1848, to re-examine the said case, and to allow the claimants the benefit of the testimony heretofore marked "Rejected

for the want of authentication;" provided the same is now legally authenticated by the executive of Alabama; the adjustment to be made in strict accordance with the act herein above referred to, and to which this act is barely supplemental.
Approved December 22, 1854.

Judging from the tenor and effect of this act, Congress had no other purpose in passing it than to require the Auditor to receive the three rejected depositions of Harrison, Turner, and Davis, which he had excluded on his first hearing of the case. The adjustment was to be in strict accordance with the act of 1848, to which *this act* was barely *supplemental*. He had refused to allow interest from the time of taking the property, but had given it from the presentation of the petition to Congress. The act having expressed no dissent from the principle which he had adopted as to the interest, the reasonable presumption is that Congress was satisfied and accepted it. If the Auditor had made a fair, probable, and reasonable apportionment of the consumed property between the army and the Indians, and had concluded from the short time the Indians held the Bassett Creek farm and from their nature, habits, and modes of life, that they had fired the houses and wheat stacks, drank the liquors, taken some of the store goods, and killed a few of the cattle and hogs for present subsistence, and had charged all that property to the army; or had taken the account of property filed by Fisher with his petition to be true, and had based his decision of the case upon either of these aspects, and allowed interest upon the whole amount from the date of the petition to Congress, it would have made an aggregate of from \$30,000 to \$35,000, and the payment of that sum at that time would probably have been satisfactory to the parties, and been received by them as a full payment of their claim. But his mode of adjustment gave them just cause of exception and complaint; they assaulted it with vigor, and upon grounds partly well founded, and made other and repeated movements upon the treasury for additional payments upon this claim, and on the 6th November, 1858, had drawn upon it an aggregate of \$66,903 33, and are now importunately asking for the payment of the large balance of \$66,519 85.

This case is one of a very large number, which illustrate the truth of this position: that a prompt, just, and liberal adjustment and payment of private claims is generally not only best for the claimants, but is most honorable and advantageous to the government and country, and results in the smallest draughts upon the treasury.

For many years the great points of contest in this claim have been, whether interest should be allowed; and, if allowed, from what time it should be computed.

Interest is not a thing of course; it is in no case a part of the debt. By the polity of many nations it is forbidden; and by those whose laws allow it in cases between individuals, it is not made a right in all. In cases of unliquidated damages it is in general disallowed; and the Georgia claims being of that character, are excluded by the general rule. (1, Opinions of the Attorney Generals, 554.)

Interest is in the nature of damages for withholding money which the party ought to pay, and would not, or could not; but where the holder of a claim omits for a long time to make application for payment, and the act of Congress is silent as to interest, he does not come within the reason of the rule. (*Ibid.*, 278.)

Interest is not a legal incident to a debt due from the United States, where it is merely proved that a debt is due. (*White vs. The United States*, Devereaux, 93.)

The right to interest is wholly conventional in its origin, as it depends

upon law and usage; where they are not found the right cannot be said to exist. (*Todd vs. The United States, Ibid., 93.*)

The liability of the United States to pay interest cannot be founded on such usage as enters into and forms a part of the contract of individuals; the usage is directly and expressly the reverse. (*Ibid., 94.*)

The government has not only omitted to pay interest, but for the greater part of a century it has expressly refused to pay it. (*Ibid.*)

This court cannot allow interest upon claims against the United States in the absence of a contract to pay it, even "in cases of long delay under vexatious and oppressive circumstances," as this would render necessary the exercise of a vague and unlimited discretion not vested in the court. (*Ibid., 95.*)

There are no acts, nor is there any general law of Congress, which impose upon the United States the liability to pay interest upon debts due by them, nor has any general appropriation of money ever been made by Congress for the purpose of paying claims for interest. (*Ibid., 94.*)

The interest on the claim of the representatives of George Fisher, deceased, for property taken or destroyed by the United States, should be computed from the time of the taking or destruction of the property. (*Toucy, 5. Opinions of Attorney Generals, 71.*)

There is no law of Congress upon which that proposition can be assumed in relation to this case, except the act of 1848, before quoted at length, which authorized the Second Auditor "to examine and adjust that claim upon principles of justice and equity;" there are no other words in the law that could be construed to allow interest. Do they authorize its allowance; if so, from what time?

The principles, and their reason, which regulate to some extent both payment and interest between the United States and its citizen creditors, are different from those which apply to individuals. As to debts between the latter, the general principle requires the debtor to hunt up the creditor for the purpose of making payment, and where the debt is evidenced by writing, interest commences to run from the time it makes it payable, and where the date of payment is fixed by parol, or custom and usage, interest will equitably accrue from it. The United States does not permit itself to be sued, because of the presumption that it is always prepared and willing to pay its debts; and it would be both unseemly and unnecessary for the citizen to coerce the nation by the judgment of its own courts. But it is not required to hunt up and make payments to its creditors wherever they may be found that would be impracticable; payment must be sought by the creditor at the place fixed for it by law. When the contract, whether written or parol, stipulates for interest, the United States is bound to pay it according to the stipulation; the treasury officers cannot pay it in any other cases. Congress may order its payment at will, and ought to do so in all cases where there is a just and equitable claim to it.

The position of the government to the individual is, that it cannot be sued. Why? The government answers: I am the representative of the nation, the organ of its power and justice, and it is not becoming, neither is it necessary, that the nation should be coerced by the judgments and decrees of me, its organ and creature. It is the duty and pleasure of the nation to fulfill all its obligations to the citizen. If any citizen have a claim against the nation, as it is affluent, great, and just, let him establish it by reasonable proof, and ask payment of it from the government, and thereupon he shall have what in equity and justice is due to him, and so long as it is withheld after these conditions are complied with, he shall have the universal compensation of non-payment—interest.

The due administration of this principle would do much to make government a blessing.

When the question is made by a creditor to Congress for the payment of interest in a case where it is not provided for by the contract, or by any law, that is the principle and the rule which should decide the question. It is the one adopted by Congress in the act of 1848, for the adjustment of this claim, the justice and equity of the case; and what is that justice and equity as to the question of interest against the United States?

The use and destruction of the property was upon a remote Indian frontier. It had been first in the possession of the Indians, and then of the United States troops, and both have been engaged in consuming and destroying it, but to what extent, respectively, is not shown. The United States accounting officers could not have known of the use and destruction of this property, much less of the kinds and quantities of it used and destroyed by the Indians and the troops, respectively. If Fisher was then absent in North Carolina, or Georgia, he had left agents in the possession and care of the property; and when he returned he could have learned from them with reasonable certainty the kinds, quantities, and values of the property that were at the Bassett Creek farm when they abandoned it to the Indians; and what, when they returned and resumed possession. The reasonable presumption is that he did, and that the account which he filed with his petition, and sworn to by his overseer and worker in leather, sets forth the facts truly as to the property the Indians left and the army found there and used or destroyed.

It was the business of Fisher to present his claim against the United States for his property that had been taken, used, and destroyed by its army; and it was both his business and duty to show by evidence the kinds, quantities, and values of that property; until he had done this, there was no obligation established against the United States to pay the value of that property, and there could be no liability upon them, by any legal or equitable principles for interest upon that value. These conditions were not performed by Fisher until the filing of his petition and the accompanying proofs in 1832; he therein presented and established his claim against the United States for a large amount; the sum was left in uncertainty, and there is every probability that it might have been made more certain by the more careful proof of Haden and Davis, and by men connected with the army that occupied the Bassett Creek farm. But the whole amount of the claim that his evidence established against the United States, the Auditor, under the act of 1848, should have allowed, and also interest upon it from the filing of his petition and proof, viz: February 13, 1832, as from that time, "on principles of justice and equity," he was entitled to interest.

By the principles assented to by this committee, on April 22, 1848, when the Auditor made the report of his first settlement, the United States owed Fisher's representatives upon this claim \$32,645 52; the Auditor reported in their favor \$8,873, which they appear to have received on that day, leaving a balance due and owing to them of \$23,772 52.

The Auditor was prevailed upon to reopen the case, and in December, 1848, he heard it again, and on the 30th of that month made a report of his second decision; from which it appears that he allowed to Fisher's administrators "the sum of \$8,973, and interest thereon" from the 13th of February, 1832, the date of filing the petition, amounting to \$18,035 73, from which he deducted \$8,873, paid to the said parties on the 22d April, 1848, adding interest from date on the latter, which together

made the sum of \$9,237 79; and this sum he deducted from the \$18,035 73, leaving a balance in favor of said administrators of \$8,797 94, which they appear to have received the same day from the treasury.

This last report presents the Auditor in the strange predicament of having so far changed and corrected his first decision as to allow to Fisher's representatives the other half of the total value of the property that in his first report he found to have been used and destroyed, with interest upon it from the date of filing the petition; and crediting their aggregate produce with the amount of his first award in their favor, with interest upon it from the date of the award, and not having allowed them any interest whatever on the amount first so awarded to them. In the judgment of the committee, the principle, rule, and process adopted by the Auditor in his second settlement required him to have charged against the United States the whole amount of Fisher's property, used and destroyed by the troops, to have allowed interest upon that amount from the filing of his petition, to have credited the aggregate sum with the amount of his first award at the date of its payment, and to have reported in favor of the administrator for the residue.

Interest on \$23,772 52, the amount due on this claim the 22d April, 1848, after the first payment of \$8,773 had been made upon it, to the 31st of December, 1848, was \$860 69, making an aggregate of \$24,633 21, from which deduct \$8,797 94, the second payment then made, and upon the second award of the Auditor, and there remained due upon the claim \$15,835 27. It appears that a further and third settlement of, and payment upon this claim, was made at the Treasury Department, May 12, 1849, of \$10,004 89; interest upon the residue still owing to that time, was \$395 87, which being added to it makes \$16,231 11, from which deduct said payment of \$10,004 89, and there remained \$6,226 22. Interest upon this remainder to the 12th October, 1859, is \$3,578 70, and the two sums make \$8,740 92; and yet, on that day, there was paid at the treasury on account of this claim, \$22,881 28, being \$13,141 36 more than balance due upon it, and most strange, twenty-five days afterward, 6th November, the treasury officers made a further payment on this claim of \$16,346 22, making the over-payment of it \$29,487 58, allowing interest from the time of the use and destruction of the property upon its value.

This claim was not presented until the lapse of a long time from its origin, and seems to have lingered until the passage of the act of Congress of 1848; but from that time it was pressed with extraordinary vigor and yet more extraordinary success. Two Secretaries of the Treasury resisted any further payment upon it after the two awards of the Second Auditor and the receipt of the sums which he reported in favor of the claimant by his representatives. But it was vehemently contended for them that Congress had, with the consent of the claimant, constituted the Auditor an arbitrator to settle the claim, and the Secretary had no authority to revise, reverse, modify, or control his award; but that it was final, and there was no appeal from it to any power; and a short extract from the opinion of Mr. Attorney General Reverdy Johnson, which does not give the tenor and effect of the entire opinion, is relied upon by the claimants to establish that position. The Secretary of the Treasury, Mr. Meredith, submitted two questions connected with this case to the Attorney General, and in his reply, on the question of interest, he said: "By reference to the act giving relief in this case, it will be seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department has any jurisdiction over it. His judgment was absolute. By the last re-

part of that officer he did allow interest, and the interest with the principal then allowed has been paid the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought—whether correctly is not submitted to me, and I express no opinion upon it—that such was the meaning of the law. His successor, under another rule, perfectly well settled, had no right to disregard the decision. He is bound to esteem it a correct one.” (See *United States vs. Bank of Metropolis*, 15 Pet., 377.)

The positions taken by Mr. Johnson are: 1. That the whole subject of the claim, and every question connected with it, was submitted by the act of Congress to the sole and exclusive judgment of the Auditor; and that his decision was absolute and final—no other department having any jurisdiction over it. 2. That he had adjudged the matter of interest upon the claim, and as he had decided it, his successor was bound to accept it.

The Auditor decided to allow interest only on \$8,973 of the claim. The question of interest was made and argued to him—interest upon the whole amount from the time of the use and destruction of the property being insisted upon for the claimants. The auditor refused to allow interest from the date of taking the property, and adjudged it from the presentation of his petition to Congress by Fisher. According to the opinion of Mr. Johnson these two points were absolutely and irreversibly adjudged by the Auditor, and the claimants were thereby excluded and barred from any further sum, on both the value of the property taken and interest upon that value.

The principles of his opinion have a further application to this case. He takes the position of the claimants, insisted upon strenuously in the whole progress of this case, that the Auditor was constituted an arbitrator between the United States and the claimants by the act of Congress, and his judgment of the case, and every question in it, did not appertain to his duties of Auditor, and, therefore, was not subject to the revision of the Secretary of the Treasury, but was final and absolute. These principles were applicable as well to the first as to the second decision of the Auditor, and, therefore, his first judgment of the case, that the representatives of Fisher were entitled to only the sum of \$8,973, without interest, was a final settlement. Congress had the power, and exercised it, after the Auditor's second decision, to pass a law reopening the case; but, by the opinion of Attorney General Johnson, the second decision of the Auditor is a judgment in bar against every claim of Fisher's representatives, except for the sum of \$18,035 73, to be credited with \$8,873, paid 22d April, 1848, with interest thereon to the date of his said judgment; that was what he allowed by it, and comprehended all that he did allow, both for the value of the property and interest upon that value.

When the arbitrator had made his first award, the case passed from his power, and he had no more authority to reopen it than the Secretary of the Treasury had to revise and reverse it; and the contest about this claim was then brought to a finality if Congress had not reopened it.

The opinion of Attorney General Toucy has been much relied upon by the representatives of Fisher; this is the pith of it: “In administering the relief provided by the act of Congress for the legal representatives of George Fisher, deceased, approved April 12, 1848, it being held by the Second Auditor that the value of the property taken or destroyed, with interest upon it, is to be paid as ‘a fair and full indemnity,’ it would seem to follow, of course, that the interest should be computed

from the time when the property was taken or destroyed by the troops of the United States." Here is an implied admission that the solution of the questions of the value of the property, and interest upon it, had been devolved by the act of Congress upon the Auditor. He did decide both, and embodied his decision in his written second award; he adjudged the value of the property to be \$8,973, and that it should carry interest from the presentation of Fisher's petition to Congress, 12th February, 1832, and ruled against the claim for a larger value and interest from the time of taking the property. The decision of these two points by the Auditor Mr. Toucy ignores, and assumes a position on the matter of interest, not only in conflict with the allowance of it by the Auditor, but which he had distinctly overruled. The Auditor may have erred, but the Attorney General no more than the Secretary of the Treasury had the power to revise and correct his errors; that could be done by the authority of Congress only.

But the claimants procured another settlement with the Third Auditor, in which he allowed them the further sum of \$10,004 89, which was paid them at the Treasury Department May 12, 1849; and after the lapse of more than five years, December 22, 1854, the claimants prevailed with Congress to pass another act, providing "that the duties imposed, or required to be performed, by the act of Congress, entitled An act supplemental to an act therein mentioned, approved December 22, 1854, including the act to which it is supplemental, be and the same are hereby, transferred to the Secretary of War, who shall proceed *de novo* to execute the same in their plain and obvious meaning."

How the Secretary of War, John B. Floyd, proceeded to execute this act is shown by his letter dated January 19, 1859, to Senator Iverson, chairman of the Committee on Claims, filed in the papers, in which he says:

In the execution of the duty thus confided to me, I reopened the case, and, after a full and careful examination of all the testimony adduced, allowed, as the value of property taken or destroyed by the troops, the sum of \$18,104; on which amount, being satisfied that such was clearly the intention of the law, I directed that interest should be paid at six per cent. from the date of the destruction. The amount so awarded, after deducting from it former payments, has been paid to the claimants at the treasury.

* * There had already been three settlements by the Second Auditor: 1st. In April, 1848, that officer allowed the sum of \$8,873 as the value of the property, without interest. 2d. In December of the same year, after correcting a mistake in addition on the previous settlement, so as to make the principal \$8,973, interest was awarded thereon from February 13, 1832, at six per cent., amounting to \$18,035 73, from which was deducted the amount of the first award, with interest, leaving a balance of \$8,797 94, which was paid. 3d. On the 12th May, 1849, interest amounting to \$10,004 89 was paid on the above sum of \$8,973 from the 13th of July, 1813, which seems then to have been assumed as the date of destruction. These several payments amount to \$27,675 83, which, added to the amount recently paid under my decision, gives as the total of all sums paid on account of this claim, \$66,903 33.

Secretary Floyd here shows that interest was estimated by him upon \$18,035 73, the total amount of the value of the property taken, according to his estimate, from the 13th July, 1813; but Haden, the overseer, proves that the massacre of Fort Mims occurred 29th or 30th of August, 1839, and "two or three days after that attack of Fort Mims, the Indians attacked Fort Sinkfield, about three or four miles from where I was doing business. I had the care of said Fisher's property. We were compelled to fly to St. Stephens for safety, between thirty and forty miles. The Indians then in the settlement destroyed everything they could, after which the troops who were ordered in pursuit of said hostile Indians were commanded by Colonels Thomas Carson and Russell, and a number of militia, who took and made use of some of the crops and stock which was not taken by the hostile Indians." This witness,

who had the best means to know, thus shows that the United States troops did not get to the Bassett Creek farm, until early in September, 1813. Berry, another witness, proves that he had been living in that neighborhood, and joined the army as a militiaman, and was with it when the field of corn, &c., on the Alabama River, near to Fort Claiborn, was consumed by the army; and that it was in August or September of 1814, so that Secretary Floyd computed for claims \$230 78 for interest on time before the property was destroyed.

But still the claimants were not satisfied; their appetites seemed to grow by feeding, and in June, 1860, they procured Congress to pass still another resolution, which authorized and required the Secretary of War to re-examine and settle this account of George Fisher, deceased; and the strangest feature in this long pending and strange case is, that this last settlement shows an aggregate of payments to Fisher's representatives, on account of this claim, of \$66,903 33, and a balance still due his representatives of \$66,519 85.

When it is shown that George Fisher himself made out his account against the United States for the use and destruction of his property by particulars, to each of which were attached values; and on the 7th of December, 1831, proved this account by the oaths of R. G. Haden and Wiley Davis, his overseer, and his worker in leather, and filed it with his petition to Congress, asking pay for this property, which was presented and filed 13th February following; and all the proof that was afterward taken presents but one additional class of property to those set forth in the account, viz: a lot of seventy-five or eighty-five fat hogs, worth fourteen dollars per head; and also a field of corn, peas, and pumpkins, proved to have been worth thirty-five hundred dollars, which, added to the amount, makes an aggregate of but \$16,463 of principal debt, it may well be asked by what ledgerdmain, after the payment of \$66,903 33 upon that debt, there can still be owing upon it \$66,519 85? It may be answered, that the claimants, emboldened by their sweep, presented to the Secretary of War another argument, without any additional proof, in which they claim in detail an advance in the value of each item of property to produce an aggregate of \$51,612; and the Secretary brought up his previous estimate of \$18,104 to \$34,952, and computed interest upon the latter amount from September, 1813. If the further question is put, how, after the lapse of a few months, the same Secretary, upon identically the same claim and proof, could add \$17,848 to his estimate of the value of the property, we frankly confess our inability to answer it.

The case, in its total claim and all the items, and the entire force of proof in support of it, was before the Second Auditor when he first heard it, notwithstanding he rejected the depositions of Harrison, Turner and Davis. The statements in those depositions are vague, uncertain, and many of them from hearsay. They do not materially change the case from what it is made by the other proofs; but their exclusion was harped upon from time to time, even after they had been admitted upon authorization, to procure Congress to pass acts for reopening the case after it had been repeatedly decided. When the payment of \$16,346 22 was made on the 6th November, 1858, the value of all the property of Colonel Fisher, which had been used or destroyed by the United States troops in the Creek Indian war, with interest from the time of use and destruction, had been paid, and largely overpaid. The property at the Bassett Creek farm, upon a liberal estimate, was of the aggregate value of

\$12,963; interest upon it from 1st September, 1813, to 6th November, 1858, when the last payment was made at the Treasury Department upon this claim, is \$35,140, and the two sums, being added together, make \$48,103. The property consumed on the farm near Fort Claiborne was of the value of \$3,500, interest upon which from 1st September, 1814, is \$9,277 97, making together \$12,777 97; the total of the value of property and interest being \$60,880 97.

On those payments upon this claim at the Treasury Department, \$8,773, April 22, 1848; \$8,797 94, December 31, 1848; \$10,004 89, May 12, 1849; \$22,881 28, October 12, 1858; and \$16,346 22, November 6, 1858, compute interest on cash from the time of payment to the date to which interest was calculated upon the value of Fisher's property used and destroyed, and the principal and interest make an aggregate of \$82,973 36, which exceeds the aggregate amount of the value of the property used and destroyed, and interest upon that value from the time of its use and destruction, by \$21,091 31; but compute interest upon the value of the property from February 13, 1813, when the petition was filed, and the claim is overpaid by \$40,096; interest upon it from November 6, 1858, makes the sum of \$68,162 20, which Fisher's representatives now owe the United States. Congress has, in the most liberal spirit and good faith, passed many special acts to have the just claims of Colonel Fisher against the United States for his property used and destroyed by the army fully satisfied; but when his representatives, after receiving payments upon it amounting to the enormous sum of \$66,903 33, after the second and inexplicable decision of Secretary Floyd, by which he awarded to them the further sum of \$66,519 85, only \$383 48 less than the aggregate amount they had received, were importunately pressing at the treasury the payment of this flagitious award, the patience of Congress became exhausted; and by joint resolution of March 2, 1861, it repealed the resolution of June 1, 1860, authorizing the Secretary of War to revise his first settlement. But these voracious claimants were not satisfied. On the passage of the rescinding resolution, they filed their petition in the Court of Claims, setting up the second award of Secretary Floyd, claiming that it adjudged to them the further sum of \$66,519 85, and that their right to that sum was finally and conclusively established by his decision, and asking the judgment of the court against the United States for that amount. Upon hearing of the case, the prayer of the petitioners was denied, and their petition dismissed by the court. But these unappeasable claimants were still not satisfied; being repulsed from the court they again returned upon Congress, and, up to this time, have continued their assaults vigorously upon it.

They assume that, by the first act of 1848, Congress appropriated the money to pay not only the \$66,903 33 which they have received, but also the further sum of \$66,519 85, the amount of the balance of their claim, which Secretary Floyd awarded in their favor, and which they have not received, and modestly ask Congress to pass an act to prevent the appropriation of the latter sum in their favor from lapsing, and directing the treasury officers to pay it to them. Congress has manifested an extraordinary spirit, not only of justice but liberality, toward this claim. It gave too ready heed to the representations and importunities of Colonel Fisher's representatives, but it had no purpose to afford them facilities to plunder the treasury. Those representatives were men of intelligence and business capacity; they may be presumed to have understood fully and correctly the whole account between themselves, as the representatives of Colonel Fisher, and the United States. It cannot be

reasonably doubted that when the joint resolution authorizing and directing Secretary Floyd to revise his execution of the act of 1858 passed, they knew that this whole claim had been fully paid upon the most liberal principles of equity and justice; that their position, that there was a balance due upon it was a false pretense, and that Congress was procured to pass that resolution by false and fraudulent representations. The award of Secretary Floyd under it is also false and fraudulent, and utterly null and void.

Wherefore the committee recommend the rejection of the bill which has been referred to them, entitled "A bill to prevent an appropriation therein mentioned from lapsing because of delay in the adjustment."